UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

BRAINWARE, INC., **Plaintiff,** **v.** **SCAN-OPTICS, LTD.,** **and** **SCAN-OPTICS, LLC, a Delaware limited liability company ,** **SERVE:** **Corporation Service Company** **2711 Centerville Road, Suite 400** **Wilmington, Delaware 19808** **Defendants.**	**Civil Action No. 3:11cv755-REP**

FIRST AMENDED COMPLAINT

Plaintiff Brainware, Inc. ("Brainware" or "Company"), by counsel, brings this First Amended Complaint against Defendants Scan-Optics, Ltd. ("Scan-Optics" or "Reseller") and Scan-Optics, LLC ("Scan-Optics USA") and states as follows:

SUMMARY OF ACTION

1. In February 2010, Brainware and Scan-Optics entered into a written Value Added Reseller Agreement ("Agreement"), pursuant to which Scan-Optics agreed to purchase a minimum amount of Brainware's software plus annual maintenance for a total contract value of £1,680,000 (approximately $2,700,000).

2. Under the Agreement, Scan-Optics was permitted to resell the Brainware software licenses and associated maintenance to its own end user customers. The Agreement includes a

confidentiality clause that precludes Scan-Optics from disclosing to any third party information that is confidential to Brainware.

3. Brainware delivered the applicable software licenses to Scan-Optics, but Scan-Optics failed to make required payments to Brainware under the Agreement.

4. Scan-Optics is a wholly-owned subsidiary of Scan-Optics USA, which is owned by a private equity firm called Patriarch Partners, LLC ("Patriarch").

5. Scan-Optics USA has operated Scan-Optics as its alter ego.

6. Scan-Optics' breach of the Agreement has caused significant money damages to Brainware.

7. Brainware now seeks the aid of this Court to recover material money damages owed to Brainware by Scan-Optics and its alter ego Scan-Optics USA.

THE PARTIES

8. Brainware is a Virginia corporation with its principal place of business at 20110 Ashbrook Place, Suite 150, Ashburn VA 20147.

9. Scan-Optics is a Limited Company with a place of business located at Unit 5, Brookside Colne Way Watford, Hertfordshire WD24 7QJ England.

10. Scan-Optics USA is a Delaware limited liability company with a place of business at 169 Progress Drive, Manchester, CT 06042-2294. Upon information and belief, Scan-Optics USA's member is "Zohar CDO 2003-1, Limited." No entity by that name is registered with the Virginia State Corporation Commission and, upon information and belief, no member of Scan-Optics USA is a resident or citizen of the State of Virginia.

JURISDICTION AND VENUE

11. This Court has jurisdiction pursuant to 28 U.S.C. § 1332 because the matter is between citizens of different states and the matter in controversy exceeds the sum or value of $75,000, exclusive of interest, costs, and attorneys' fees.

12. This Court has jurisdiction over Scan-Optics because Scan-Optics expressly consented to such jurisdiction by executing the Agreement, which states the following in Paragraph 24.1 (emphasis added):

24. Jurisdiction

> 24.1. This Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Virginia as those laws are applied to contracts entered into and to be performed entirely in Virginia by Virginia residents, notwithstanding the actual state or country of residence or incorporation of either party Brainware or Reseller and without regard to choice of law principles. Any legal suit, action or proceeding arising out of or relating to this Agreement shall be commenced in a court of competent jurisdiction in Virginia, and each party irrevocably submits to the personal jurisdiction and venue of such court in any suit, action or proceeding. For purposes of establishing jurisdiction in Virginia under this Agreement, each party hereby waives, to the fullest extent permitted by applicable law, any claim that: (i) it is not personally subject to the jurisdiction of such court; (ii) it is immune from any legal process with respect to it or its property; and (iii) any such suit, action or proceeding is brought in an inconvenient forum.

13. This Court has jurisdiction over Scan-Optics USA because, among other things, Scan-Optics USA transacts business in the Commonwealth of Virginia and this judicial district.

14. Venue is proper in this Court under 28 U.S.C. § 1391 because a substantial part of the events giving rise to Brainware' claims occurred in the Eastern District of Virginia. Moreover, Scan-Optics contractually agreed to this venue and waived any claims of *forum non-convenience*.

FACTS

15. Brainware markets and sells proprietary, enterprise software applications in a market known as Intelligent Data Capture or Intelligent Data Recognition.

16. Brainware's software is used by customers to automate manual processes, such as keying, that are required to extract numerous fields of data from multiple document types into back-end systems such as Enterprise Resource Planning Systems (ERP), Document Management Systems (DMS), Customer Relationship Management (CRM), document imaging systems and image archives.

17. Information about Brainware and its customers is available on Brainware's website at www.brainware.com.

18. Brainware's target market for direct sales includes Global 2000 companies and some of the largest organizations and government agencies in the world. In addition to direct sales, Brainware also distributes its software through resellers and other channel partners. Such companies purchase licenses and associated maintenance services for the Brainware software from Brainware and resell same to their end-user customers.

Parties

19. Patriarch is a private equity firm and holding company managing 75 companies across 14 industry sectors with revenues in excess of $8 billion. Founded by Lynn Tilton in 2000, Patriarch was built upon a proprietary patented financial model designed to manage and monetize the distressed portfolios of financial institutions.

20. Since 2000, Patriarch has owned interests in and restructured more than 150 companies.

21. Patriarch believes it takes time, stability, liquidity and an appropriate capital structure to rebuild businesses. Patriarch further believes that challenging conditions often mean the need to improve operations from the ground up; the situations require equal concentration and adeptness between financial engineering and operational execution.

22. Upon information and belief, Scan-Optics USA and its employees have routinely directed and micromanaged the operations of Scan-Optics and its employees to such a degree that Scan-Optics USA dominates and controls Scan-Optics. In addition, Scan-Optics has routinely been caused by Scan-Optics USA to transfer significant portions of its profits to Scan-Optics USA, thereby leaving Scan-Optics thinly capitalized. Scan-Optics USA is the alter ego of Scan-Optics, and vice versa.

23. Upon further information and belief, Scan-Optics has also disclosed to Scan-Optics USA confidential information belonging to Brainware that was provided to Scan-Optics by Brainware under the terms of the confidentiality section of the Agreement. Scan-Optics disclosed to Scan-Optics USA confidential information belonging to Brainware that was provided to Scan-Optics by Brainware under the terms of the confidentiality section of the Agreement.

24. Under these circumstances, it would be an injustice to adhere to the fiction of distinct legal entities for Scan-Optics and Scan-Optics USA because they have operated as though they are a single entity.

25. The corporate veils of Scan-Optics and Scan-Optics USA should be pierced so as to hold Scan-Optics USA responsible for the liability of Scan-Optics to Brainware under the Agreement and for the other damages sought in this Complaint.

Breach of Contract – Failure to Pay Amounts Due

26. On or about February 26, 2010, Scan-Optics executed a Value Added Reseller Agreement ("Agreement") with Brainware. The Agreement was executed by Scan-Optics' Managing Director, Peter Moralee.

27. Among other things, the Agreement obligated Scan-Optics to purchase a minimum of £1,050,000 of software licenses, calculated as £350,000 minimum per year for each of three years.

28. Scan-Optics was also obligated to purchase annual maintenance for all software licenses, calculated at twenty percent (20%) of the price of the software licenses, for a minimum term of three years.

29. Specifically, Scan-Optics was required to purchase £630,000 of maintenance under the Agreement, calculated as follows:

a. £70,000 of annual maintenance for a three-year term (total maintenance of £ 210,000 over three years) with respect to the software licenses required to be purchased in Year 1;

b. £70,000 of annual maintenance for a three-year term (total maintenance of £ 210,000 over three years) with respect to the software licenses required to be purchased in Year 2; and

c. £70,000 of annual maintenance for a three-year term (total maintenance of £ 210,000 over three years) with respect to the software licenses required to be purchased in Year 3.

30. Section 9.2 of the Agreement outlines the payment terms that require Scan-Optics to pay Brainware the cost of software licenses, plus applicable annual maintenance, upon the earlier of:

a. net thirty (30) days after shipment of the license or pro-rata portion of the license to an end-user customer;

b. net thirty (30) days after the licenses or pro-rata portion of the licenses are first used in a production environment; or

c. eleven (11) months after Brainware's shipment of software licenses to Scan-Optics.

31. Section 9.2 of the Agreement also states that all invoices not paid within thirty (30) days will incur a late fee of 1.5% of the outstanding balance per month.

32. Section 25 of the Agreement, provides that "In the event of litigation or collection activity arising out of this Agreement, the prevailing party shall be entitled to recover its reasonable costs and expenses incurred, including attorneys' fees."

33. Brainware delivered software licenses to Scan-Optics as required under the Agreement.

34. Scan-Optics has not made any payments for software licenses or maintenance to Brainware under the Agreement.

35. Scan-Optics is required to pay Brainware all amounts due under the Agreement plus interest calculated pursuant to Section 9.2 of the Agreement.

36. Scan-Optics' failure to make the required payments and communication of Brainware's confidential information constitute a breach of the Agreement, which has caused significant money damages to Brainware.

Breach of Contract –Breach of Confidentiality Obligations

37. After Scan-Optics failed to make required payments to Brainware under the Agreement, employees and principals of Scan-Optics USA engaged in discussions with Brainware regarding the breach and did so to the exclusion of employees of Scan-Optics.

38. Scan-Optics USA was aware of confidential Brainware information that Scan-Optics USA could have obtained solely from Scan-Optics.

39. Under the Agreement, Scan-Optics is prohibited from disclosing Brainware's confidential information to any third party. Specifically, Section 14.2 states:

> The Receiving Party agrees to use the same care to prevent disclosing to third parties the Confidential Information as it employs to avoid disclosure, publication or dissemination of its own information of a similar nature, but in no event less than a reasonable standard of care: (i) to maintain the confidentiality of the Confidential Information; (ii) not to, directly or indirectly, in any way, disclose, publish or disseminate the Confidential Information to persons or entities other than to its employees, associates, directors, officers, agents, subcontractors, attorneys, accountants or professional advisors, who have a need to have access to the Confidential Information in carrying out the business transaction contemplated by this Agreement ("Authorized Representatives"); (iii) to inform its Authorized Representatives of the confidential nature of the Confidential Information and the terms of this Agreement, to direct its Authorized Representatives to treat the Confidential Information confidentially and otherwise to observe the terms of this Agreement; and (iv) to use the Confidential Information only in connection with the business transactions contemplated by this Agreement.

40. The employees of Scan-Optics USA who received confidential Brainware information from Scan-Optics were not Authorized Representatives because they were not "employees, associates, directors, officers, agents, subcontractors, attorneys, accountants or professional advisors [of Scan-Optics], who have a need to have access to the Confidential Information in carrying out the business transaction contemplated by [the] Agreement."

41. To the extent Scan-Optics or Scan-Optics USA claims that the employees or agents of Scan-Optics USA who received confidential Brainware information from Scan-Optics were Authorized Representatives under the Agreement, such claim would support Brainware's assertion that the two companies are alter egos of one another.

COUNT I
Breach of Contract

42. Brainware incorporates the allegations contained in paragraphs 1 – 41 above as though fully set forth herein.

43. The Agreement is a valid and binding contract between Scan-Optics and Brainware.

44. Brainware has fulfilled its contractual obligations under the Agreement.

45. Scan-Optics has disclosed Brainware's confidential information to a third party and failed to make payments of any amount due to Brainware under the Agreement and has therefore materially and intentionally breached the terms of the Agreement.

46. The breach of the Agreement by Scan-Optics has resulted in damages to Brainware in an amount of at least £1,680,000 plus applicable interest calculated at 1.5% per month in accordance with the Agreement.

COUNT II
Unjust Enrichment

47. Brainware incorporates the allegations contained in paragraphs 1 – 46 above as though fully set forth herein.

48. By engaging in the conduct described above, Scan-Optics has been unjustly enriched, at the expense of Brainware.

49. Scan-Optics' conduct was wanton, willful, and in conscious disregard of Brainware's rights.

PRAYER FOR RELIEF

WHEREFORE, Brainware requests that this Court grant the following relief:

1. entry of judgment in favor of Brainware and against Scan-Optics and Scan-Optics USA for breach of the Agreement and unjust enrichment;

2. entry of an order awarding damages in favor of Brainware and against Scan-Optics and Scan-Optics USA that requires a payment to Brainware at least £1,680,000, plus interest calculated at 1.5% per month as set forth in the Agreement;

3. entry of an order that requires Scan-Optics and Scan-Optics USA to pay Brainware's costs and reasonable attorneys' fees incurred in prosecuting this action; and

4. entry of an order awarding Brainware such other relief as this Court deems just.

Respectfully submitted,
BRAINWARE, INC.

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CERTIFICATE OF SERVICE

I certify that, on February 8, 2012, I caused the foregoing document to be served by email upon the following counsel of record for Defendant in this matter using the Court's ECF system, which electronically transmitted this document to counsel of record:

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